

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

ET Docket No. 92-9

No. of Copies rec'd.
List A B C D E

need to be clarified or amended in order to fully protect the integrity of the public services that 2 GHz microwave systems now support.^{2/} It is for this reason that UTC filed its petition on November 31, 1992. Below, UTC addresses the comments filed on UTC's petition.

II. COMMENTERS AGREE WITH UTC THAT THE TRANSITION FRAMEWORK MUST PROTECT THE INTEGRITY OF INCUMBENT 2 GHz MICROWAVE SYSTEMS

A. Replacement Facilities Must Be Microwave Systems

In its petition UTC requested that the FCC amend the language contained in Section 94.59(b)(1) of Appendix A, to the First R&O, in order to clarify that an incumbent 2 GHz microwave user may not be moved to non-microwave replacement facilities unless the incumbent specifically agrees to the use of such facilities.^{3/} Such a clarification is necessary, since as UTC and others have noted, often fiber optics and satellite communications do not provide a sufficient degree of reliability to act as a wholesale replacement for 2 GHz microwave systems.

The majority of commenters support UTC's proposed

^{2/} On October 29, 1992, the Commission released an Erratum clarifying that the "transition framework" adopted in the First R&O are final rules. In recognition of this fact, on January 13, 1993, Apple Computer, Inc. (Apple) specifically withdrew a portion of its original "Petition for Reconsideration" that had requested a clarification of the finality of the Commission's First R&O. Notwithstanding the programmed delay in the effectiveness of these transition rules, the adoption of final rules in the First R&O constitutes final agency action and the filing of timely petitions for reconsideration established the effective scope of judicial review. See 47 U.S.C. § 402.

^{3/} Appendix A to UTC's petition contains a proposed revision to section 94.59.

clarification. For example, the Association of American Railroads (AAR) urges that the rules not permit new technology entrants to relocate incumbent microwave facilities unless the incumbent licensee agrees that such facilities would be acceptable.^{4/}

The only parties that specifically oppose UTC's suggested clarification are Apple and American Personal Communications (APC). Both objections are based on distorted and inaccurate readings of the First R&O, and as such, should be ignored. For example, in support of its position that the FCC has already resolved that replacement facilities need not be microwave, Apple cites the following language from the First R&O:

[F]iber optics and satellites are viable alternatives to spectrum for some systems and encourage their consideration where practicable.^{5/}

However, Apple's comments fail to mention the very next sentence in the First R&O which states:

However, we are not requiring any system to convert to alternative media, but rather, have provided sufficient spectrum to accommodate those 2 GHz licensees that relocate to higher frequencies."^{6/}

Thus, contrary to Apples assertion, UTC's proposed clarification would merely make the rules consistent with the intent of the FCC as indicated by the text of the First R&O.

^{4/} AAR, pp. 4-5.

^{5/} Apple, p. 4, citing First R&O language para. 19.

^{6/} R&O para. 19.

APC argues that it is inappropriate to address UTC's concerns regarding replacement facilities within the context of a petition for reconsideration, since the FCC has sought comment on the definition of "comparable facilities" in its Third Notice of Proposed Rulemaking (Third NPRM). APC, however, appears to misunderstand the scope of the FCC's analysis of "comparable facilities." As indicated above, the FCC has clearly indicated that replacement facilities for 2 GHz microwave incumbents are to be microwave. The question of comparable facilities is simply with respect to ensuring that the replacement microwave facilities provide the same degree of reliability or quality of service as the existing 2 GHz microwave facilities.

B. Replacement Facilities Must Be Privately Owned

The American Petroleum Institute (API) and AAR echo UTC's request that the FCC clarify that an incumbent private 2 GHz microwave licensee may only be moved to private replacement

**C. Replacement Facilities Must Be
Constructed By Incumbent**

A number of commenters support UTC's request that the Commission amend its rules to clarify that while the emerging technology licensee must bear the costs, the incumbent 2 GHz microwave user has the right to oversee the engineering, construction and testing of its microwave replacement facilities. Such oversight authority should include the right of the incumbent to engineer, build and test the replacement facilities itself or to select the contractors.^{8/} Under UTC's proposed clarification the emerging technology entity would have the right to require the incumbent to justify costs incurred, and would be entitled to periodic status reports.^{9/}

APC argues that it is more appropriate to address the construction of replacement facilities within the context of the FCC's Third NPRM. The flaw in APC's argument is that the FCC's Rules as adopted in the First R&O clearly state that the emerging technology service provider is to build the replacement facilities thus leaving little room for debate during the Third NPRM portion of this proceeding.

Moreover, Telocator, commenting on behalf of the PCS industry, expressed strong support for a plan whereby existing 2

^{8/} AAR, pp. 3-4; API, pp. 7-8; Lower Colorado River Authority (LCRA), pp. 5-6. In addition, Pacific Telesis (Telesis) filed a petition requesting essentially the same clarification. The Telesis petition was supported by Cox Enterprises, Inc. (Cox).

^{9/} Appendix A of UTC's petition contains suggested rule

GHz microwave licensees and new technology licensees may determine the allocation of responsibilities regarding the preparation of relocation facilities.^{10/}

III. COMMENTERS SUPPORT COMMISSION ACTION TO CLARIFY/AMEND RULES ON EXEMPTION OF STATE AND LOCAL GOVERNMENT 2 GHz LICENSEES

In its NPRM the FCC recognized that state and local government agencies would face special economic and operational considerations in relocating their 2 GHz fixed microwave operations. To address these concerns the Commission proposed to exempt state and local government agencies from any mandatory transition periods, and to allow these agencies to continue to operate in the 2 GHz band on a co-primary basis indefinitely.^{11/}

In its petition, UTC expressed the concern that the FCC's final rules, as contained in the First R&O, may have inadvertently restricted the granting of indefinite co-primary status to "public safety licensees," and not to all state and local government licensees, such as public power agencies.^{12/} APPA expressed an identical concern in a separate petition.

As UTC noted in its petition, to restrict the exemption to "public safety" entities at this late stage would be inconsistent with the Commission's proposal. Throughout this proceeding the FCC has indicated that the proposed exemption was inclusive of

^{10/} See Telocator's comments in response to Third NPRM, ET Docket No. 92-9, filed January 13, 1993, p. 11.

^{11/} NPRM, para. 25.

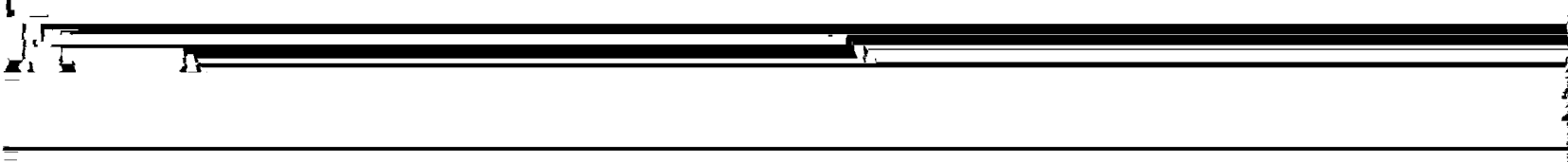
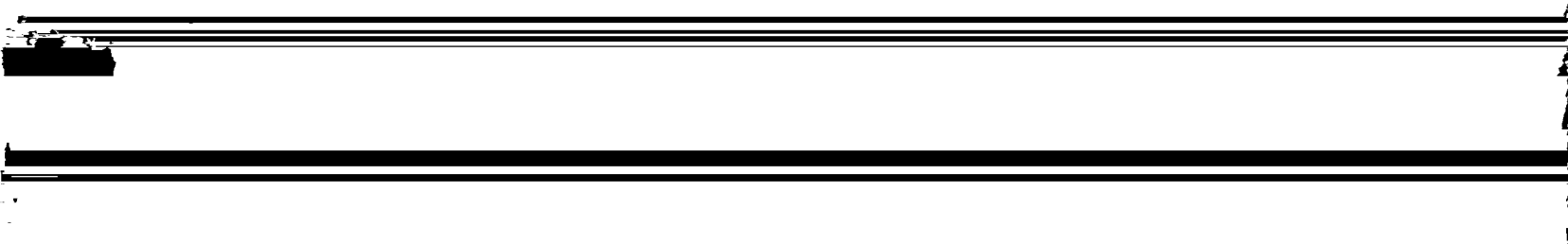
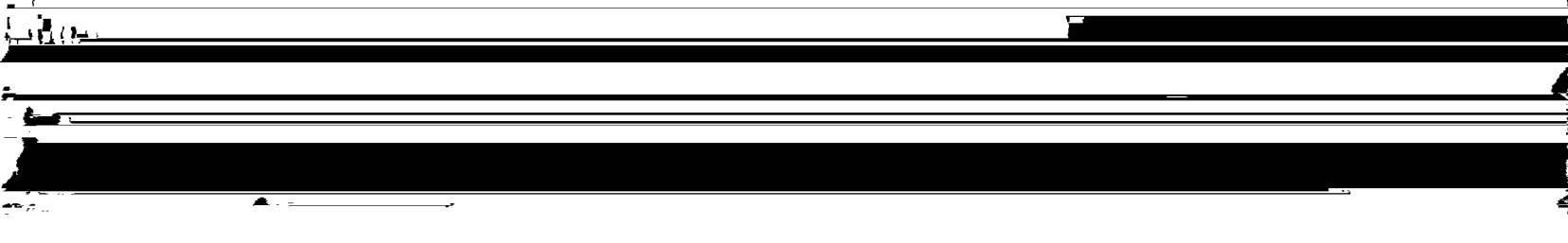

^{12/} APPA, p. 3.

all state and local government agencies licensed in the 2 GHz band, irrespective of specific agency functions. The Public Safety Microwave Committee (PSMC) and LCRA both expressed strong support for UTC's petition with regard to this point. Moreover, Commission actions, ranging from responses to Congressional inquiries and "News Releases" issued subsequent to the adoption of the NPRM, reinforced this conclusion.

APC, Cox, and Omnipoint all argue that the FCC's decision to limit the exemption to public safety entities was deliberate and is justified.^{13/} However, they offer little substance to support the FCC's disparate treatment of public safety services and other governmental entities. Moreover, they ignore the fact that under the FCC's First R&O all state and local government 2 GHz licensees, including municipal utilities, that are licensed in

Radio Service (under the Local Government Radio Service)^{15/}.

Thus, incumbent state and local government utilities operating in the 2 GHz band could arguably qualify for the FCC's exemption by amending their station licenses to change the basis of their private microwave radio eligibility from Power Radio to Local Government. This, however, would appear to impose an inefficient and unnecessary burden on licensees and the FCC's licensing staff.



on its license is for a non-Public Safety Service in which the agency may also be eligible. PSMC further notes that up until now, these radio service identifiers have had little relevance for microwave licenses, and should not become the sole criteria for the exemption.^{17/}

IV. CONCLUSION

UTC generally supports the Commission's "transition framework" as providing a mechanism to reallocate the 2 GHz band to emerging technologies while ensuring that existing users of the band emerge from the proceeding "whole" both operationally and financially.

However, in order to ensure that this transition framework adequately protects existing 2 GHz private microwave users, UTC urges the FCC to clarify that: (1) existing microwave users will not be required to relocate to non-microwave replacement facilities unless the incumbent specifically agrees to the use of such facilities; (2) the replacement system should be a private communications system, owned and controlled by the incumbent microwave licensee; (3) the incumbent microwave user has the right to oversee the engineering, construction and testing of its microwave replacement facilities; and (4) the exemption for state and local government agencies applies to all state and local government agencies.

^{17/} PSMC, p. 3.

WHEREFORE, THE PREMISES CONSIDERED, the Utilities
Telecommunications Council respectfully requests the Commission
to take actions consistent with the views expressed herein.

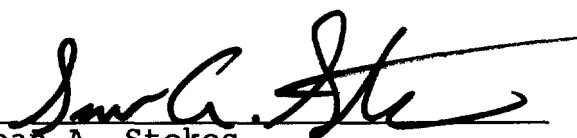
Respectfully submitted,

UTILITIES TELECOMMUNICATIONS
COUNCIL

By:


Jeffrey L. Sheldon
General Counsel

By:


Sean A. Stokes
Staff Attorney

Utilities Telecommunications
Council
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, D.C. 20036

CERTIFICATE OF SERVICE

I, Kim Winborne, a secretary with the Utilities Telecommunications Council, hereby certify that a copy of the foregoing comments was hand delivered, this 14th day of April, 1993, to each of the following:

The Honorable James H. Quello
Acting Chairman
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

The Honorable Sherrie P. Marshall
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

The Honorable Andrew C. Barrett
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

The Honorable Ervin S. Duggan
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Dr. Thomas P. Stanley, Chief
Office of Engineering and Technology
Federal Communications Commission
2025 M Street, N.W., Room 7002
Washington, D.C. 20554

Dr. Robert Pepper, Chief
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, D.C. 20554

Dr. Brian Fontes
Acting Chief of Staff
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Mr. Ralph Haller, Chief
Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Mr. Ted Coombes*
American Public Power Association
2301 M Street, N.W.
Suite 300
Washington, D.C. 20037

Margaret deB. Brown, Esq.*
James L. Wurtz, Esq.
1275 Pennsylvania Avenue, N.W.
4th Floor
Washington, D.C. 20004
Counsel for Pacific Telesis Group

Henry Goldberg, Esq.*
Joseph A. Godles, Esq.
Goldberg, Godles, Wiener & Wright
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Counsel for Apple Computer

John D. Lane, Esq.*
Robert M. Gurss, Esq.
Wilkes, Artis, Hedrick & Lane, Chartered
1666 K Street, N.W.
Washington, D.C. 20006
Counsel for Public Safety Microwave Committee

Wayne V. Black, Esq.*
Christine M. Gill, Esq.
Rick Rhodes, Esq.
Keller and Heckman
1001 G Street, N.W.
Suite 500
Washington, D.C. 20001
Counsel for the American Petroleum Institute

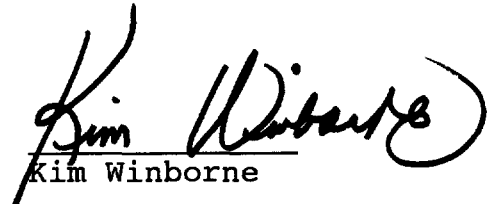
Thomas J. Keller, Esq.*
Lawrence R. Sidman, Esq.
Jacqueline R. Kinney, Esq.
Verner, Liipfert, Bernhard,
McPherson and Hand, Chartered
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005
Counsel for Lower Colorado River Authority

Jonathan D. Blake, Esq.*
Kurt A. Wimmer, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
Counsel for American Personal Communications

Werner K. Hartenberger, Esq.*
Laura H. Phillips, Esq.
Melissa Rogers, Esq.
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
Counsel for Cox Enterprises, Inc.

Albert H. Kramer, Esq.*
Robert F. Aldrich, Esq.
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Penthouse Suite
Washington, D.C. 20005-3919
Counsel for North American
Telecommunications Association

Mark J. Tauber, Esq.*
Nora E. Garrote, Esq.
Piper & Marbury
1200 19th Street, N.W.
Washington, D.C. 20036
Counsel for Omnipoint Communications, Inc.


Kim Winborne

* Delivered by postage-paid mail